79-6779

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

RECEIVED
JUN 16 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SYLVESTER GAVIN,

Petitioner,

-vs-

CHARLES E. ANDERSON, Warden,

Respondent.
_____/

MOTION TO PROCEED IN FORMA PAUPERIS

Now comes SYLVESTER GAVIN, and moves this Court for leave to proceed in forma pauperis.

Petitioner alleges that he is indigent, and files the attached Affidavit in support of his motion to proceed in forma pauperis, to so prove.

WHEREFORE, Petitioner Sylvester Gavin prays leave to proceed in forma pauperis.

Respectfully submitted,

Sylvester Gavin

SYLVESTER GAVIN, in Pro Se
Serial No. 91669
Lock Box 492
Ionia, Michigan 48846

Dated:_____

No. 79-6770

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

RECEIVED
JUN 16 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SYLVESTER GAVIN,

Petitioner,

-vs-

CHARLES E. ANDERSON, Warden,

Respondent.

STATE OF MICHIGAN
ss
COUNTY OF IONIA

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

SYLVESTER GAVIN, being first duly sworn, deposes and says that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and the issue which I desire to present in the petition is the following:

> Whether the court of appeals erred and denied petitioner his consitutional right to appeal when it dismissed his appeal for want of jurisdiction, instead of remanding the case to the district court to permit petitioner to establish excusable neglect, where he alleges a timely forwarding of his notice of appeal, and the notice of appeal bears a notarization day of May 19, 1979, well within the time allowed for timely notice.

I further swear that the responses which I have made to the questions below relating to my ability to pay the cost of prosecuting the petition are true.

1. That I am not presently employed; and my last employment was in 1969, my approximate wages per month was $450.00.

2. I have not received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source.

3. I do not own any cash or checking or saving account.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. I do not have any dependencies.

I understand that a false statement or answer to any portion of this affidavit will subject me to penalties for perjury.

Sylvester Gavin

SYLVESTER GAVIN,
Serial No. 91669
Lock Box 492
Ionia, Michigan 48846

Subscribed and sworn to before me
this 10 day of June 1980

Robert H Miller

NOTARY PUBLIC, Ionia County, MI
Robert H. Miller
My Commission Expires: 9-13-1983

Let the petitioner proceed without prepayment of costs or fees or the necessity of giving security therefor.

SUPREME COURT JUSTICE

No. 79-6770

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

RECEIVED
JUN 16 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SYLVESTER GAVIN,

Petitioner,

-vs-

CHARLES E. ANDERSON, Warden,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PROOF OF SERVICE

Prepared by:

SYLVESTER GAVIN, in Pro Se
Serial No. 91669
Lock Box 492
Ionia, Michigan 48846

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RECEIVED
JUN 16 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

SYLVESTER GAVIN,

Petitioner,

-vs-

CHARLES E. ANDERSON, Warden,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The opinion of the court of appeals [Appendix A, infra pp. 7-9], is referred to as No. 79-1980, by the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1980. No rehearing or extension of time has been previously requested or granted. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred and denied petitioner his constitutional right to appeal when it dismissed his appeal for want of jurisdiction, instead of remanding the case to the district court to permit petitioner to establish excusable neglect, where he alleges a timely forwarding of his notice of appeal, and the notice of appeal bears a notarization date of May 19, 1979, well within the time allowed for timely notice of appeal.

STATEMENT

Petitioner Sylvester Gavin filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. 2254, with the district court for the Eastern District of Michigan, Southern Division, December 8, 1978.

The petition was assigned to Judge Damon Keith.[1] An opinion and judgment was entered April 30, 1979, dismissing the petition.

Petitioner Gavin being a state prisoner under the control of prison officials was confined to the segregationblock at the State Prison of Southern Michigan at Jackson, Michigan, May 17, 1979, before he had an opportunity to perfect his notice of appeal. He did though solicit, and received, the aid of a fellow prison, Jerry Van Diver #141306, to perfect and forward his notice of appeal to the district court. [Appendix B, p. 10, Affidavit of inmate Van Diver in regards to the notice of appeal]. Inmate Van Diver forwarded the notice of appeal directly to the attention of the district judge instead of the clerk as provided by the Federal Rules of Appellate Procedures, rule 4, on or about May 19, 1979, as the notarization thereon reflects. Michigan's Attorney General and petitioner Gavin were provided copies of the notice of appeal.

Fearing that the issue as drafted by inmate Van Diver restricted review of the issue for the court of appeals consideration, petitioner Gavin forwarded a letter May 27, 1979, to Judge Cook modifying the question presented. The time for appeal did not expire until May 30, 1979.

On July 5th and 16th, 1979, petitioner Gavin forwarded letters, [Appendix C, pp. 11-12], of inquiry to Judge Cook in regards to the status of the notice of appeal. The clerk of the court of appeals, John H. Hehman, was forwarded a copy of the July 16th letter under separate cover letter. No replies were received.

August 3, 1979, petitioner Gavin forwarded a petition entitled Emergency Petition For Writ Of Mandamus for filing to the court of appeals. Case No. 79-8079. Judge Cook responded with a letter dated August 14, 1979, [Appendix D, p. 13], to which petitioner Gavin replied with his letter of August 17, 1979. [Appendix E, pp. 14-15].

---

[1] Subsequent to the filing of the petition for habeas corpus Judge Damon Keith was promoted to the Sixth Circuit Court of Appeals. The case was then assigned to his successor Judge Julian Abele Cook, Jr.

On September 24, 1979, an order was entered by the court of appeals denying petitioner Gavin's petition for writ of mandamus, [Appendix F, p. 16].

Also, on the August 3rd date an entry appears on the docket entries of the district court for filing of a notice of appeal. As indicated above, not once was there any communication with the clerk of the district court. All matters in regards to the notice of appeal were forwarded directly to Judge Cook.

On October 2, 1979, petitioner Gavin received a copy of the Order Granting Certificate Of Probable Cause, and October 5, 1979, a copy of the Order Granting Petitioner's Request To Proceed In Forma Pauperis.[2]

Hearing no word whatsoever after receipt of the October 2nd and 5th orders, petitioner Gavin forwarded a letter to the court of appeals inquiring about the amount of time in which his brief must be filed to the court. He was informed that a letter had been forwarded to his former place of incarceration and returned, and that since the time for filing his brief had passed he must request an enlargement of time. Petitioner undertook the filing of the motion for enlargement of time and the same granted enlarging the time to, and including, January 28, 1980.

Petitioner Gavin filed his brief with the court of appeals January 28, 1980. The same was dismissed May 21, 1980, for want of jurisdiction; stating as the reason, petitioner Gavin's failure to file a timely notice of appeal.

REASONS FOR GRANTING THE WRIT

The court of appeals has departed from the accepted and usual course of judicial proceedings in petitioner Gavin's case.

It is well established that inmates confined in prison are permitted to assist one another.[3] In this particular case petitioner Gavin sought, and received, the assistance of inmate Jerry Van Diver

---

[2]Subsequent to the August 3rd filing petitioner Gavin's custody status was reduced and he transferred from State Prison of Southern Michigan to Michigan Training Unit at Ionia, Michigan—August 24, 1979.

[3]Johnson v Avery, 393 U.S. 483 (1969).

#141306, to draft and forward his notice of appeal to the district court. On May 19, 1979, inmate Van Diver, not acquainted with proper court procedures forwarded the notice of appeal directly to the attention of Judge Cook. On May 27, 1979, petitioner Gavin forwarded a letter to Judge Cook modifying the issue forwarded in the May 19th notice of appeal.

Technically the procedure as described above is in error. However, both inmate Van Diver and petitioner Gavin are laymen at law and should not be held to the stringent standards of attorneys.[4] To dismiss petitioner Gavin's appeal because he forwarded the notice of appeal to the judge instead of the clerk, in essence, if not in fact, is holding a layman to the stringent standards of attorneys. Moreover, appellate courts are concerned that some notice be filed.[5]

It has not been alleged that no notice of appeal has been filed. The claim, as stated, is filing the notice of appeal outside the time period. At the other end of the dichotomy the claim is, the notice of appeal was forwarded directly to the district court judge, within the time period, and that was sufficient notice to confer jurisdiction upon the court of appeals, or for the court of appeals to remand the matter to the district court.

Analyzing the facts herein we find that the notice of appeal was required to be filed on or before May 30, 1979. However, from June 1st until June 30, 1979, within this period an extension of time may have been requested to extend the time period for a 30 day period. That is until July 30, 1979. Conceivably the district court could have entertained a notice of appeal up to, and including, July 30, 1979.

---

[4] Haines v Kerner, 404 U.S. 519 (1972).

[5] Durham v United States, 400 F2d 879, certiorari denied 89 S Ct 1204, 394 U.S. 932, 22 L Ed 2d 462 (1968), the court states, "Because a notice of appeal is a necessary jurisdictional prerequisite to an appeal, some notice must be filed which is regarded as sufficient by appellate court." (Emphasis added).

Appellate courts require that "some notice" be given.[6, 7, 8] The letters forwarded July 5th and 16th, 1979, provided sufficient notice within the allowable period. The procedure employed herein may be termed irregular. But, the court of appeals has the power to overlook irregularities where fairness and justice so require.[9]

Petitioner Gavin adamantly contends that when his notice of appeal of May 19th and letter of May 27th were received by the district court judge, the accepted and usual judicial proceeding required him to inform the appellant of the error in filing, and provide copies of rules or guidelines in which to follow.[10]

---

[6] Id.

[7] Weaver v State of Texas, 469 F2d 1314 (1972), we find, "Where, despite fact that docket entry showed that notice of appeal was filed on June 1, 1972, and that order denying petition for writ of habeas corpus was entered on February 29, 1972, the notarization of the notice of appeal was executed on March 28, 1972, on which date the notice was allegedly mailed so that it should have been received by district court clerk on March 29, 1972, case would be remanded to correct the record or to permit petitioner within 30 days to request the district court to extend the time for appeal on a showing of excusable neglect."

[8] United States v McKnight, 593 F2d 230 (C.A. Pa. 1979), there the court held, "Where notice of appeal is received after expiration of 60 day period, but within 30 days thereafter court of appeal may rule upon merits of appeal if, and only if, determination of excusable neglect has been properly entered by district court."

[9] United States v Hoye, 548 F2d 1271 (C.A. Mich. 1977), the court states, "Where document is filed within 40 day period which represents clear assertion of intent to appeal criminal conviction, courts of appeal have power to overlook irregularities where fairness and justice so require."

[10] Judge Julian Cook is Judge Damon Keith successor. The transition of office occurred during the time petitioner Gavin's case was in its final stage at the district court. It is highly likely that the notice of appeal and letter were misplaced as a result of transition of offices.

In addition, due to his relative newness to the Federal Bench, Judge Cook may have been unfamiliar with the accepted procedure regarding pro se, incorrectly forwarded, notices of appeal and took no action until the August 3, 1979, date.

The Federal Rules of Appellate Procedure, rule 4, is narrowly drawn regarding the 30 day period in which to file the notice of appeal. Failure to abide by the rule, in most cases, is fatal. However, the rule does allow the 30 day period to be extended upon a showing of excusable neglect, or other circumstances. As a matter of fact, legally and realistically, the time period may encompass a period of 90 days.

Petitioner Gavin on four separate occasions made clear his intent to appeal the opinion and judgment of the district court. Each document advancing that intent was forwarded to the court within 90 days from the date of the opinion and judgment. His appeal in the court of appeals was not entitled to dismissal for want of jurisdiction.

Moreover, the court of appeals having reviewed the notice of appeal, at the least, should have seen the notarization date of May 19, 1979, and remanded the case to the district court "to correct the record or to permit petitioner [Gavin] within 30 days to request the district court to extend the time for appeal on a showing of excusable neglect."[11] Fairness and justice tolerates no other procedure.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Sylvester Gavin

SYLVESTER GAVIN, in Pro Se
Serial No. 91669
Lock Box 492
Ionia, Michigan 48846

Dated: _____

---

[11] Weaver v State of Texas, supra, [469 F2d 1314 (1972)].

AFFIDAVIT

STATE OF MICHIGAN
ss
COUNTY OF IONIA

SYLVESTER GAVIN, being first duly sworn, deposes and says that he executed the foregoing petition and knows its contents, and the same is true of his own knowledge, except as to those matters which are stated to be upon information and belief, and to those matters he believes them to be true.

Sylvester Gavin
SYLVESTER GAVIN,
Petitioner in Pro Se

Subscribed and sworn to before me
this 10 day of June 1980
Robert H. Miller
NOTARY PUBLIC, Ionia County, MI
Robert H. Miller
My Commission Expires: 9-13-1983

APPENDIX A

No. 79-1580

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAY 21 1980
JOHN P. HEHMAN, Clerk

SYLVESTER GAVIN,

Petitioner-Appellant,

v.

CHARLES ANDERSON, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: KEITH, BROWN, and MARTIN, Circuit Judges

This matter is before the Court for consideration of the appellant's response to this Court's order to show cause why the appeal should not be dismissed for lack of jurisdiction because the notice of appeal was not timely filed.

It appears from the record that the final judgment of the District Court was entered on April 30, 1979. Under Rule 4(a), Federal Rules of Appellate Procedure, the notice of appeal in this civil action was due to be filed on or before May 30, 1979. It was not filed, however, until August 3, 1979, well beyond the prescribed appeals period.

It further appears from the record that appellant did not apply to the District Court for an extension of time to file late the notice of appeal based upon excusable neglect, and it appears that no such extension has been granted by the District Court.

The failure of an appellant to file a timely notice of appeal deprives an appellate court of jurisdiction. Browder v. Director, Department of Corrections, 434 U.S. 257 (1978); Levisa Stone Corp. v. Elkhorn Stone Co., 411 F.2d 1208 (6th Cir. 1969), cert. den., 397 U.S. 925 (1970). Further Rule 26(b), Federal Rules of Appellate

Procedure, specifically provides that a court of appeals may not enlarge the time for filing a notice of appeal.

Therefore, it is ORDERED that the present appeal be and it is hereby dismissed. Rule 9(d)1, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

No. 79-1580

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CICUIT

FILED

APR 3 1980

JOHN P. HEHMAN, Clerk

SYLVESTER GAVIN,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA

Respondent-Appellee

O R D E R

Petitioner is appealing from a judgment denying his petition for writ of habeas corpus filed under 28 U.S.C. §2254.

It appears from the record that the final judgment was filed on April 30, 1979. Under Rules 4(a), Federal Rules of Appellate Procedure, the notice of appeal in this civil action was due to be filed by May 30, 1979. However, the notice of appeal was not filed until August 3, 1979, and appears to be seventy-five (75) days late.

It further appears from the record that petitioner did not apply to the District Court for an extension of time to file late the notice of appeal based upon excusable neglect, and it appears no such extension has been granted by the District Court.

Accordingly, it is ORDERED that petitioner show cause in writing not later than twenty-one days from the file date of this order why the appeal should not be dismissed for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

APPENDIX B

STATE OF MICHIGAN
ss
COUNTY OF JACKSON

AFFIDAVIT OF JERRY VAN DIVER

Now comes JERRY VAN DIVER and states as follows:

1. Sylvester Gavin and myself discussed filing a notice of appeal immediately prior to his confinement in segregation block on May 17, 1979.

2. That having had the notice of appeal drafted, with proof of service bearing my name, Jerry Van Diver, I forwarded said notice directly to Judge Julian A. Cook, United States District Judge, on May 19th.

3. That Sylvester Gavin has allowed me to review the copy of the letter dated August 14th with attachments. The docket sheet does not reflect a notice of appeal on or about May 19th. However, a check with Sylvester Gavin revealed that he did not forward any appeal on August 3rd. Therefore, it should be ascertained whether or not the August 3rd notice of appeal bears a notary stamp of May 19th, 1979; thereby verifying that said notice has been laying dormant in Judge Cook's office.

4. That the attached letter further reveals the difficulties Sylvester Gavin and myself were having while he was in segregated confinement. Due to the lack of communication, neither he nor myself realized the district court was not acting on said notice.

further affiant sayeth not.

JERRY VAN DIVER, Affiant
Serial No. 141306

Subscribed and sworn to before me
this 28th day of Aug

Shelby L Frazier III
NOTARY PUBLIC, Jackson County, MI

My Commission Expires: 4-13-81

SHELBY L. FRAZIER, III
Notary Public, Genesee County, Mich.
My Commission Expires April 13, 1981

July 5, 1979

The Honorable Julian Cook
United States District Court
Eastern District of Michigan
Southern Division
Federal Building
Detroit, Michigan 48226

Re: Sylvester Gavin -vs- Charles E. Anderson, Civil Action No. 8-73163.

Dear Judge Cook:

On or about May 19, 1979 a Notice of Appeal was filed in the above captioned matter. The notice was forwarded to your attention. It has been a considerable amount of time and I have received no word regarding your issuance or denying a certificate of probable cause. Therefore, would you please check into the matter and ascertain the reason for delay in this matter.

Thank you in advance for your hoped for courtesy and cooperation in this matter.

Sincerely,

Sylvester Gavin

SYLVESTER GAVIN, in Pro Se
Serial No. 91659
P.O. Box E
Jackson, Michigan 49204

cc: file

July 16, 1979

The Honorable Julian Cook
United States District Court
Eastern District of Michigan
Southern Division
Federal Building
Detroit, Michigan 48226

Re: Sylvester Gavin v Charles E. Anderson, Civil Action No. 8-73163
Certificate For Probable Cause.

Dear Judge Cook:

This a request for the status of the Notice of Appeal filed with you on the 19th day of May 1979, from your final judgment of the 30th day of April, 1979.

As of the above mentioned date I have received no reply to my repeated requests for issuance of a certificate of probable cause so that I can perfect my appeal in the Sixth Circuit Court of Appeals on my criminal conviction. I believe you are obligated by Federal Court Rules to answer the Notice of Appeal and issuance of a certificate of probable cause, within the time prescribed--forty (40) days. There has already been an unreasonable delay of sixty (60) days, or more, as of this date.

The Sixth Circuit does not appreciate an unjustified delay in appealing criminal convictions, and that court may wish to ascertain the reasons for such a delay in the above mentioned case.

I am proceeding in Pro Se, i.e. as my own attorney, attempting to perfect my criminal appeal timely, and protect my constitutional rights as well, without any assistance from this court.

Therefore, pursuant to Federal Rules of Civil Procedures, please inform me when I can expect my certificate of probable cause granting me to proceed with my appeal in the Sixth Circuit. If no decision has yet been made, I would advise one to be made.

By copy of this letter I am asking the assistance of Mr. John P. Hehman, Chief Clerk for the Sixth Circuit, to ascertain the reasons for this unjustified delay on my Notice of Appeal.

I will await a prompt response to this letter. Thank you in advance for your hoped for courtesy and cooperation in this matter.

Respectfully,

Sylvester Gavin

SYLVESTER GAVIN, in Pro Se
Serial No. 91669
P.O. Box E
Jackson, Michigan 49204

cc: John P. Hehman,
Chief Clerk of the Court

APPENDIX D

United States District Court
For the Eastern District of Michigan
Detroit 48226

Julian Abele Cook, Jr.
U. S. District Judge
Detroit, Michigan 48226

August 14, 1979

Mr. John P. Hehman
Clerk
United States Court of Appeals
for the Sixth Circuit
Cincinnati, Ohio 45202

Re: Case No. 79-8079
Sylvester Gavin, Petitioner vs.
United States District Court,
E.D. of Michigan, S.D. at Detroit,
Respondent
District Court No. 8-73163

Dear Mr. Hehman:

You have invited my response to Sylvester Gavin's Petition for Writ of Mandamus filed in your Court on August 9, 1979, wherein Petitioner alleges that this Court has failed to respond to his request for issuance of certification of probable cause.

As stated in the Petition, this Court dismissed the Petition for Writ of Habeus Corpus on April 30, 1979 (copy of Opinion and Order, dated April 30, 1979, attached, Exhibit 1); however, this Court did not receive a request for certification of probable cause which Mr. Gavin claims to have filed on or about May 19, 1979. Additionally, the Clerk of this Court has no record of the May 19, 1979 letter (copy of docket sheet attached, Exhibit 2).

Nevertheless, the Court feels that the April 30, 1979 Opinion and Order dismissing the Petition for Writ of Habeus Corpus fairly and accurately adjudged Petitioner's habeus request.

I thank you for this opportunity to respond.

Very truly yours,

JULIAN ABELE COOK, JR.
United States District Judge

JAC:paf
Enc.

c.c. Mr. Sylvester Gavin
c.c. Mr. John P. Mack
Assistant Attorney General

APPENDIX E

August 17, 1979

Mr. John P. Hehman,
Clerk of the Court
United States Court of Appeals
For The Sixth Circuit
Cincinnati, Ohio 45202

Re: Sylvester Gavin -vs- United States District Court Judge, Case #79-0079.

Dear Mr. Hehman:

I am in receipt of a copy of Judge Julian Cook's letter to you dated August 14, 1979. His letter is not dispositive of my claim and he is in complete error.

The Notice of Appeal was filed on the 19th of May 1979. See attached Notice of Appeal forwarded directly to Judge Cook as Exhibit 1. Judge Coock has attached the docket sheet that indicates the appeal was filed August 3rd; but I believe that the notice layed on Judge Cook's desk until either my letter dated July 16th, to you or the filing of the petition for writ of mandamus. He then had the Clerk of the Court file the notice reflecting the August 3rd date for verification of his not receiving my notice of appeal on May 19th.

As noted in the notice of appeal at page 4, it states:

> The above named petitioner is confined in segregation which is segregated detention for the reason, for refusing to move to another prison facility, and inmates confined in segregation does not have ready access to the courts, e.g. notary public service.

A resident, Jerry Van Diver, filed said notice in my behalf as next friend and counsel. See Affidavit of Jerry Van Diver enclosed herein. Also, see enclosure letter of May 17th requesting a certificate of probable cause as Exhibit 2. In addition, while in segregated confinement I forwarded a letter to Judge Cook regarding a certificate of probable cause. Enclosed please find letter dated May 27th to Judge Cook, as Exhibit.3.

More important, if the letter dated August 3rd that I received from the district court indeed allows my appeal to this Court, then the herein issue is moot. However, I will await your reply for confirmation that I have been permitted to appeal Judge Cook's opinion dated April 30, 1979.

If and when this fact is verified, please dismiss the petition for writ of mandamus without prejudice.

I will thank you in advance for your hoped for courtesy and cooperation in this matter.

Respectfully,

Sylvester Gavin

SYLVESTER GAVIN,
Serial No. 91669
P.O. Box E
Jackson, Michigan 49204

cc: Judge Cook
file
enclosure

APPENDIX F

FILED

SEP 24 1979

JOHN P. HEHMAN, Clerk

No. 79-8079

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SYLVESTER GAVIN,

Petitioner

v.

UNITED STATES DISTRICT COURT,
E.D. OF MICHIGAN, S.D. AT DETROIT,

Respondent

ORDER

BEFORE: WEICK and CELEBREZZE, Circuit Judges and PECK, Senior Circuit Judge

This matter is before the Court upon consideration of petitioner's petition for a writ of mandamus, respondent's response, and petitioner's reply.

It appears that on April 30, 1979 a memorandum opinion and order accompanied by a separate judgment were entered denying petitioner's application for habeas corpus relief pursuant to 28 U.S.C. 2254. It further appears from the District Court docket sheet in Civil No. 78-73163, that petitioner's notice of appeal was received by the District Court on July 30, 1979 and filed on August 3, 1979.

Petitioner in his petition and reply states that on two occasions in May 1979 he requested issuance of a certificate of probable cause. Respondent states that no such request has yet been received.

Petitioner requests an order of this Court which would direct respondent to issue a certificate of probable cause or this Court to

issue such certificate. Rule 22(b), Federal Rules of Appellate Procedure, in pertinent part states, "If an appeal is taken by the (habeas) applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue." District Judge Cook has not yet either granted or denied a certificate. The short time lapse from the filing of the notice of appeal to the present, is not such an extraordinary circumstance that would necessitate this Court invoking the drastic remedy of mandamus. Califano v. Moynahan, 596 F.2d 1320 (6th Cir. 1979). Furthermore, the initial determination of whether a certificate of probable cause shall issue is to be made by the District Court; McKibben v. Hopper, 565 F.2d 1316 (6th Cir. 1978), cert. den., 99 S.Ct. 461 (1978); and mandamus will not be used to control the discretion of the district court, Will v. United States, 389 U.S. 90 (1967).

Accordingly, it is ORDERED that the petition for a writ of mandamus be and hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

DISTRIBUTED
SEP 2 1980

RECEIVED
SEP 2 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6770

SYLVESTER GAVIN,

Petitioner,

v

CHARLES E. ANDERSON, Warden,

Respondent.

ORIGINAL COPY

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM IN RESPONSE

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Stephen F. Schuesler
Assistant Attorney General
525 West Ottawa Street
763 Law Building
Lansing, Michigan 48913
(517) 373-1124

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QUESTION PRESENTED

Whether Petitioner's Notice of Appeal from the April 30, 1979 judgment of the District Court was timely filed with the clerk of the District Court as required by Rule 4(a) of the Federal Rules of Appellate Procedure and 28 USC § 2107.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit dated April 3, 1980 and May 21, 1980 are as set forth in Petitioner's Appendix A.

JURISDICTION

Jurisdiction is as stated in the petition.

COURT RULE AND STATUTORY PROVISIONS

Prior to its amendment effective August 1, 1979, Rule 4(a) of the Federal Rules of Appellate Procedure provided in pertinent part as follows:

> "In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; . . .
>
> " * * * .
>
> "Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. . . ."

28 USC § 2107 provides in pertinent part as follows:

"Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

" * * * .

"The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree."

STATEMENT OF THE CASE

This is a habeas corpus action which originated on December 8, 1978 in the United States District Court for the Eastern District of Michigan. The docket entries in the District Court (attachment A) indicate that the District Court's judgment dismissing the petition for habeas corpus was entered on April 30, 1979 and that Petitioner's Notice of Appeal from that judgment was filed with the clerk of the court on August 3, 1979. Following the docketing of Petitioner's appeal in the United States Court of Appeals for the Sixth Circuit and the submission by both parties of briefs on the merits, the Court of Appeals sua sponte issued its order on April 3, 1980 that Petitioner show cause why his appeal should not be dismissed for lack of jurisdiction. Since no response to the Court's show cause order was requested of the Respondent, none was given. On April 29, 1980, Respondent received a copy of Petitioner's reply to the Court of Appeals order to show cause. The reply asserted essentially the same claim advanced herein, i.e., that Petitioner's Notice of Appeal was timely mailed directly to the District Court judge rather than to the District Court clerk. No objection was filed by Respondent to Petitioner's contention. The Court of Appeals order dismissing Petitioner's appeal for lack of jurisdiction entered May 21, 1980 and this petition followed on June 16, 1980.

In his petition to this Court, Petitioner claims that the Notice of Appeal was forwarded by a fellow prisoner "directly to the attention of the district judge instead of the clerk as provided by the Federal Rules of Appellate Procedure, rule 4, on or about May 19, 1979 . . ." (Petition, page 2). Petitioner has attached the affidavit of inmate Jerry VanDiver (Petitioner's Appendix B) in support of his claim. Petitioner also claims that the Michigan Attorney General was provided with a copy of the Notice of Appeal.

Respondent's only knowledge of when the Notice of Appeal was received by the District Court comes from the docket entries which are attached. Also, the letter dated August 14, 1980 from United States District Judge Cook to Sixth Circuit Court of Appeals clerk John Hehman (Petitioner's Appendix D) indicates that the District Court never received Petitioner's letter of May 19, 1979.

However, Respondent Warden did receive on May 21, 1979 via institutional mail copies (attachment B) of Petitioner's Notice of Appeal, Affidavit in Support of Notice of Appeal, and of Petitioner's transmittal letter addressed to Judge Cook.

Petitioner further maintains that on May 27, 1979, prior to the expiration of the time for appeal, he forwarded a letter to Judge Cook modifying the question to be presented on appeal (Petition, page 2). The docket entries of the District Court do not reflect that this letter was ever received by the court. However, on or about June 11, 1980, the Michigan Attorney General did receive via interdepartmental mail a copy of a letter (attachment C) dated May 27, 1980 to Judge Cook Modifying the issue to be presented on appeal.

CONCLUSION

The Court of Appeals was, of course, limited in its determinations by the record before it. The docket entries in the District Court indicate that the 30-day time limit under Rule 4(a) and 28 USC § 2107 for filing a timely notice of appeal was not met. That time limit is applicable to habeas corpus proceedings, is mandatory and jurisdictional. Browder v Director, Illinois Department of Corrections, 434 US 257; 54 L Ed 2d 521; 98 S Ct 556 (1978). However, because of the receipt on May 21 and June 11, 1979 by Respondent of Petitioner's mailings as indicated, Respondent would not have opposed (and does not now oppose) a remand to the district court for correction or modification of the record. Rule 10(e), Fed R App P.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Stephen F. Schuesler
Assistant Attorney General
525 West Ottawa Street
763 Law Building
Lansing, Michigan 48913
(517) 373-1124

Dated: August 28, 1980

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PLAINTIFFS | DEFENDANTS

4-30-79

(1) Sylvester Gavin (2)

(1) Charles D. Anderson
Warden of State Prison of
Southern Michigan at Jackson
Michigan (2)

CAUSE

PRISONER PETITIONS - Habeas Corpus

ATTORNEYS

In Pro Per
#91669
Box #
Jackson, MI 49204

Frank J.Kelley by John P.
Mack (P28407) Crim.Div.
Law Bldg. 525 W.Ottawa
Lansing,MI. 48913
(517)373-1120

1978

Dec. 8 1. Petition for Writ of Habeas Corpus. DD 12/1X/78

" 20 2. ORDER requiring filing of responsive pleading on or before Feb. 13/79. DD 12/20/78 Konives, M.

1979

Feb.2, 3. Correspondence between plft & writ clerk. DD.2/2/79

" 14, 4. Appearance of Frank Kelley on behalf of deft with notice. DD.2/14/79

" 14, 5. Deft's notice of state trial transcript(transcript not attache. DD.2/14/79

" 14, 6. Deft's motion to dismiss & alternative motion for summary judgement with affidavit & B/A. DD.2/14/79

" 14, 7. Proof of service re #4-6. DD.2/14/79

CHECK FIRE AWAY	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	DATE MAILED

ATTACHMENT "A"

	NR.	PROCEEDINGS
5	8	Brief in opposition to Motion to Dismiss & Alternative Motion for Summary Judgment, with proof of service. DD 3/6/79.
30	9.	Memorandum Opinion & Order denying plft's petition for writ of habeas corpus. DD.5/2/79 Cook,J.
30,	10.	JUDGMENT: entered on behalf of deft & plft's petition for writ of habeas corpus is dismissed. DD.5/2/79 Cook,J.
3	11.	Pltf's notice of appeal with aff. DD 8/3/79
3	12.	Letter to atty. re: appeal. DD8/3/79
3	13.	Proof of service re: appeal to John P. Mack 525 W. Ottawa Lansing MI 48913 and CCA. DD 8/3/79.
30	14.	Cert. of service re notice of appeal. DD 8/3/79

MICH. DEPT. of CORR.

MEMORANDUM

TO: Keith Roberts
Attorney General's Office DATE: 5/22/79

FROM: Warden's Office - STate Prison of So. Mich.

SUBJECT: Sylvester Gavin vs Charles E. Anderson,
Civil Action 78-73163

The attached documents were ceived in the Warden's Office by institutional mail on 5/21/79.

JDP:ao

cc: Tom Patten

ATTORNEY GENERAL
CORRECTIONS DIVISION
MAY 23 1979
Assigned

CSD-106A
REV. 1'72

ATTACHMENT "B"

The Honorable Judge Cooke
United States District Court
Eastern District of Michigan S.D.
Federal Building
Detroit, Michigan 48226

Re: Sylvester Gavin vs Charles Anderson
Civil No. 78-73163

Dear Judge Cooke:

Enclosed please find Notice of Appeals Motion to Proceed In forma Pauperis, Affidavit in support of Motion to proceed In forma pauperis, and Certificate of Service, for your consideration and approval for the issuance of Certificate of Probable cause.

Thank you in advance for your anticipated courtesy and cooperation in this respect.

Respectfully

Sylvester Gavin
91669
P.O. Box E
Jackson, Michigan 49204

JVD/ sq
cc. Frank Kelly
Attorney General
file.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SYLVESTER GAVIN

Petitioner

- vs -

CA # 73-73163

CHARLES E. ANDERSON, WARDEN OF
STATE PRISON OF SOUTHERN MICHIGAN
AT JACKSON, MICHIGAN

Respondent.

NOTICE OF APPEAL

AFFIDAVIT IN SUPPORT OF NOTICE OF APPEAL

Sylvester Gavin
Serial NO. 91669
P. O. Box E
Jackson, Michigan 49204

in Pro Se

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SYLVESTER GAVIN

Petitioner

- vs - CA # 78-73163

CHARLES E. ANDERSON, WARDEN OF
STATE PRISON OF SOUTHERN MICHIGAN
AT JACKSON, MICHIGAN

Respondent.

NOTICE OF APPEAL

Notice is HEREBY given that Sylvester Gavin, Petitioner the above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit, from the final judgment entered in this action on the 22nd day of May 1979.

Respectfully submitted

S/ Sylvester Gavin

Sylvester Gavin
Serial NO. 91669
P. O. Box [illegible]
Jackson, Michigan 49204

in Pro Se

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SYLVESTER GAVIN

Petitioner

- vs - CA # 78-73163

CHARLES E. ANDERSON, WARDEN OF STATE PRISON OF SOUTHERN MICHIGAN AT JACKSON, MICHIGAN

Respondent.

STATE OF MICHIGAN)
COUNTY OF JACKSON) ss

AFFIDAVIT IN SUPPORT OF NOTICE OF APPEAL

I, Sylvester Gavin, being first duly sworn, deposes and says that I, am the Petitioner in the above entitled cause; that in support of my notice of appeal and to pay fees and costs and to the security therefore, I state that I am unable to pay the costs of said proceedings and give security therefore; that I believe I am entitled to redress; that the issues which I desire to present on appeal are the following:

THE DISTRICT COURT COMMITTED ERROR WHEN IT ERRONEOUSLY STATED IN DENYING PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS THAT PEOPLE V TILL, 80 MICH APP 16 (1977) CONTROLS THIS STATE OF MICHIGAN LAW, WHERE ANOTHER MICHIGAN CASE, THAT OF PEOPLE V RICE, 80 MICH PP 172, IS TO THE CONTRARY OF PEOPLE V TILL, SUPRA, AND SUPPORTS THE GRANTING OF PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS.

I, Sylvester Davin, understands, that a false statement or answer to any questions in this affidavit will subject me to a penalties for perjury.

Respectfully submitted

/s/ Sylvester Davin

Sylvester Davin
Serial #. 81.6.
P. O. Box E
Jackson, Michigan 492 4

In Pro Se

Subscribed and sworn to before me this date: May 19 1979

Jerry VanDiver #141366

Dennice McCullum 127521

Eddie Lee 132141
ATTEST:

The above named Petitioner is confined in segregation which is segregated detention for the reason, for refusing to move to another prison facility, and inmates confined in segregation does not have ready access to courts, e.g., notary public service.

STATE OF MICHIGAN

USE IT AGAIN

DEPARTMENT OR DIVISION	PERSON	DEPARTMENT OR DIVISION	PERSON
[redacted]	[redacted]		
MR. CHARLES E. ANDERSON			
Regional Administrator			
WARDEN SPSM			

To file

ATTORNEY GENERAL
CORRECTIONS DIVISION
JUN 11 1979
Assigned to Abood 6/13/79

Honorable Julian A Cook
United States District Court
Eastern District of Michigan
Federal Bldg
Detroit, Michigan 48226

Re Garrison vs Anderson, Civil No 78-73163.

Dear Judge Cook

At the time of filing of my Notice of Appeal I was in the detention block (I'm still in the det. block). The detention poses its peculiar problems in filing any pleadings to the courts. Therefore, a pleading cannot be drafted the notice of appeal is not completely satisfied with the issues as framed by me. Therefore, at this time I wish to modify the issues to be raised:

The district court committed error in denying petitioner's petition for writ of habeas corpus, in holding that Davis v. Tinsley, 119 Mich App 10 (1982), limits the scope of Michigan's statute of the issue on which instructions where requested, M.C.L. 750.316 (1931), excluded the same defenses to the charge.

The district court committed error in denying petitioner's petition for writ of habeas corpus stating that petitioner did not show he was prejudiced by the trial court's failure to instruct on malice a necessary element of felony murder.

The district court committed error in concluding that petitioner's failure to object to his jury instructions precluded judicial review and relief.

ATTACHMENT "C"

Hopefully, the foregoing modification will serve you to issue a certificate of probable cause expeditiously.

Thank you in advance for your hoped for courtesy and consideration in this regard.

Sincerely,

[redacted]
Secial No. 91669
P.O. Box E
Jackson, Al. 36701

cc: Attorney General
file

P. O. BOX E
JACKSON, MICHIGAN 49204

LANSING Pony -

DEPT. OF THE
ATTORNEY GENERAL
JUN 1 1979
Assigned to Roberts